

IYANGBE (Migration) [2020] AATA 5743 (8 December 2020)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Uyi Gabriel IYANGBE
CASE NUMBER:	1903500
DIBP REFERENCE(S):	BCC2016/3104539
MEMBER:	Kira Raif
DATE:	8 December 2020
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision to cancel the applicant's Subclass 801 (Spouse) visa.

Statement made on 08 December 2020 at 2:12pm

CATCHWORDS

MIGRATION – cancellation – Partner (Resident) (Class BS) visa – Subclass 801 (Spouse) – false or misleading information – relationship ceased before visa grant – child from another relationship – genuine and exclusive relationship – absence of a birth certificate – applicant sponsored his new wife – employment and social contribution to the community – financial responsibilities to family – decision under review affirmed

LEGISLATION

Migration Act 1958, ss 101-105, 107, 109, 359
Migration Regulations 1994, r 2.41

CASES

MIAC v Khadgi (2010) 190 FCR 248

STATEMENT OF DECISION AND REASONS

Application for review

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to cancel the applicant's Subclass 801 (Spouse) visa under s.109(1) of the *Migration Act 1958* (the Act).
2. The applicant is a national of Nigeria, born in July 1984. He was granted a Partner visa on 11 May 2016. On 24 October 2018 the applicant was issued with the Notice of Intention to Consider Cancellation (NOICC, Notice) as the delegate formed the view that the applicant did not comply with ss. 101 and 104 of the Act. The applicant provided his responses in November 2018 and January 2019. On 14 February 2019 the delegate decided to cancel the Partner visa held by the applicant. The applicant seeks review of that decision.
3. The applicant appeared before the Tribunal on 2 December 2020 to give evidence and present arguments. The Tribunal also received oral evidence from the applicant's friend. The applicant was represented in relation to the review by his registered migration agent. For the following reasons, the Tribunal has concluded that the decision to cancel the applicant's visa should be affirmed.

Relevant law

4. Section 109(1) of the Act allows the Minister to cancel a visa if the visa holder has failed to comply with ss.101, 102, 103, 104, 105 or 107(2) of the Act. Broadly speaking, these sections require non-citizens to provide correct information in their visa applications and passenger cards, not to provide bogus documents and to notify the Department of any incorrect information of which they become aware and of any relevant changes in circumstances.
5. The exercise of the cancellation power under s.109 of the Act is conditional on the Minister issuing a valid notice to the visa holder under s.107 of the Act, providing particulars of the alleged non-compliance. Where a notice is issued that does not comply with the requirements in s.107, the power to cancel the visa does not arise.

Did the notice comply with the requirements in s.107?

6. Section 107 is only engaged if the Minister or delegate considers that the visa holder has not complied with one of the provisions mentioned in s.107(1). It is only then that the Minister or delegate is entitled to give notice to the visa holder under s.107. Therefore, if a notice is to be given under s.107, the Minister or delegate must have reached a state of mind where they consider that the visa holder has not complied with one or more of the relevant provisions.
7. The Tribunal has considered the validity of the NOICC. The Tribunal is satisfied that it contains sufficient particulars to enable the applicant to identify and address the issues and also that the delegate had reached the necessary state of mind to engage s.107. The Tribunal is satisfied that the notice issued under s.107 complied with the statutory requirements.

Was there non-compliance as described in the s.107 notice?

8. The issue before the Tribunal is whether there was non-compliance in the way described in the s.107 notice, being the manner particularised in the notice, and if so, whether the visa

should be cancelled. The non-compliance identified and particularised in the s.107 notice was non-compliance with s. 101 and 104 of the Act.

Primary decision

9. The applicant provided to the Tribunal a copy of the primary decision record. It indicates that the applicant first entered Australia as a holder of the Prospective Marriage visa in January 2013, sponsored by Ms Anette Iyangbe and he applied for the Partner visa in May 2013. On the application form 47SP, in response to Question 31 about the applicant's children, he stated 'n/a'. The applicant was granted the Temporary Partner subclass 820 visa on 12 June 2013.
10. In April 2015 the applicant submitted further information in support of the Partner (Migrant) visa. The applicant answered 'yes' in response to the questions whether he was still in a genuine and continuing relationship with the sponsor and whether they have a mutual commitment to a shared life as husband and wife to the exclusion of all others. The applicant was granted the permanent visa on 11 May 2016.
11. On 2 November 2017 the applicant sponsored Ms Majemite (Daisy) Iyangbe and Osarugue (Paul) Iyangbe (born on 17 December 2014) for the Tourist Subclass 600 visas. The applicant provided in support of that application a marriage certificate issued in Nigeria, stating that he and Ms Daisy Iyangbe were married in Nigeria in July 2017. The applicant also provided the child's birth certificate showing that the child was born on 17 December 2014 and that the applicant and Ms Iyangbe are the child's parents. These documents were confirmed by the Nigerian authorities as being genuine. The primary decision record indicates that the applicant was in Nigeria between 30 March and 13 April 2014.
12. The NOICC states that following the birth of the child, the applicant's answer to Question 31 of the application form became incorrect. The primary decision record indicates that the applicant's Facebook account includes a range of photographs uploaded in July 2016 when the applicant visited Nigeria following the grant of his permanent visa. The photographs and comments relate to the visa applicant and his child and indicate that the visa applicant was aware of the existence of the child at least at that time. The delegate found that the applicant had not informed the Minister about the change of his circumstances and breached s. 104 of the Act.
13. The primary decision record indicates that Ms Daisy Iyangbe's Facebook account shows that she has been representing herself with the applicant's surname since July 2014, which would suggest that her relationship with the applicant continued to exist after the applicant's visit to Nigeria in 2014. The delegate suggested that Ms Daisy Iyangbe's use of the applicant's surname from 2014 and the re-establishment of contact soon after the applicant was granted his visa suggests that the relationship commenced during the March – April 2014 trip and continued throughout the processing of the applicant's visa application so that the applicant was not in a genuine relationship with the sponsor to the exclusion of all others. The delegate found that the applicant did not comply with s. 101 of the Act by answering 'yes' to the questions that he and the sponsor were in a genuine relationship and had a mutual commitment to a shared life as husband and wife to the exclusion of all others.
14. The delegate also noted that the conception of a child around March – April 2014 may indicate that the applicant entered into a relationship with Ms Majemite Iyangbe at that time and was no longer in a committed relationship with the sponsor to the exclusion of all others. The delegate found that the applicant gave incorrect answers about his relationship with the sponsor and thereby breached s. 101 of the Act.

15. The delegate found that the applicant's circumstances changed following the birth of Paul and the applicant failed to inform about the changes in circumstances, thereby breaching s. 104 of the Act.

The birth of the child

16. The Tribunal will first deal with the birth of the child and the applicant's compliance with s. 104 of the Act.
17. The applicant's evidence to the delegate is that he met Daisy at a party when he visited his home country in April 2014, they had protected sex and he did not believe, or was not sure, until 2016 that Paul was his son. The applicant states that he would not want to give the Department information he was not certain about and he did not have proof such as a birth certificate, to show that the child was his. The applicant also told the Tribunal that because he did not have proof of paternity, he did not think he could inform the Department about the child in 2016 and prior to that time he did not accept the child as his own.
18. The Tribunal is mindful that the applicant's evidence appears to be inconsistent with the applicant's draft Nigerian passport application dated 2015, in which he refers to Paul as his next of kin. The Tribunal acknowledges the applicant's evidence that he had never submitted that application, but he does not deny having completed the paperwork in which he identified Paul as his next of kin. It suggests that the applicant did acknowledge the child as his own, or at least accepted that possibility before 2016. There is no reason why the applicant would consider identifying the child as his next of kin to the Nigerian authorities, yet claim that he was too uncertain about the child's parentage to inform the Australian authorities. The Tribunal also notes the applicant's evidence that his first partner – the sponsor – supported him in bringing the child to Australia. The Tribunal is mindful that the applicant's relationship with the sponsor broke down shortly after the applicant was granted his permanent visa, so these conversations must have taken place before the grant of the visa. That also suggests that the applicant believed the child to be his before he was granted a permanent visa. In the Tribunal's view, the applicant intentionally withheld information about the child from the Department so as not to jeopardise his Partner visa application.
19. The applicant claims he did not have the birth certificate for the child and for that reason could not inform the Department. The Tribunal is of the view that there is no reason why the applicant could not have informed the Department about the birth of the child first and then undertaken to obtain the birth certificate later. There is nothing preventing the applicant from communicating information to the Department even if he was not in possession of documentary evidence to support his claims. The Tribunal does not accept that the absence of a birth certificate prevented the applicant from informing the Department about the child's birth.
20. The applicant also submits that he was unaware of his obligation to inform of changes in his circumstances. The Tribunal is mindful that this obligation exists whether or not the applicant was aware of it. It would have also been set out in the application form.
21. The applicant submits that he did inform the Department about the birth of his child in September 2017 by submitting form 1022. The Tribunal acknowledges that he did so but that was nearly three years after the birth of the child and not, in the Tribunal's view, as soon as practicable, as required by s. 104. The Tribunal is mindful that the applicant provided that information when he made an application for citizenship to the Department.
22. Overall, the Tribunal has formed the view that the applicant withheld information about the child prior to the visa grant and that he did so deliberately so as not to jeopardise the visa grant.

23. In his response to the NOICC the concedes that he had a child and failed to inform the Department about the changes in his circumstances. The Tribunal has formed the view, for the reasons stated above, that prior to the visa grant, the applicant was aware of the existence of the child, believed the child to be his and deliberately withheld that information from Immigration. That may have formed the basis for finding a breach of s. 104 of the Act. However, the applicant provided to the Tribunal DNA test results which show that he is excluded from being the child's biological father. There is no suggestion that the child was adopted by the applicant, either formally or customarily, and there was no reason for the adoption to take place if the applicant believed that he was the biological father of the child. Whatever responsibilities the applicant adopted in relation to the child do not, in the Tribunal's view, amount to a formation of a parent - child relationship between the applicant and Paul.
24. The Tribunal finds that even though the applicant believed he had a child, he did not in fact have a child prior to visa grant. The applicant's subjective (and mistaken) belief does not give rise to an obligation under s. 104 where in fact, there had been no changes in his circumstances. For that reason, the Tribunal finds there was no breach of s. 104 of the Act.

The applicant's relationship with the sponsor

25. The other ground of cancellation identified in the NOICC is the applicant's relationship with Ms Daisy Iyangbe so that his relationship with the sponsor was not to the exclusion of all others. The NOICC refers to a number of factors which may suggest that the applicant commenced a relationship with Ms Daisy Iyangbe before he was granted the permanent visa. The applicant claims, essentially, that there was never a relationship between them, that she used him to either obtain money or secure residence in Australia and for these reasons also she lied about the paternity of the child.
26. The applicant claims in his declaration of 7 November 2018 and evidence to the Tribunal that his relationship with the sponsor was always genuine. He states that his relationship with Ms Daisy Iyangbe started in May 2017 and they decided to marry in July 2017. He claims he had no relationship with Ms Daisy Iyangbe before May 2017. The applicant also provides an explanation with respect to each of the concerns noted in the NOICC.
27. The Tribunal has formed the view that the applicant has not been truthful in his evidence concerning the relationship with the sponsor. The Tribunal places weight on the fact that in his submission in response to the NOICC the applicant claims he left the family home on 30 July 2016 and separated from the sponsor from 1 August 2016. While he also suggested in his written response and initially in oral evidence to the Tribunal that the relationship continued until 2018, the applicant conceded in his evidence to the Tribunal that he and the sponsor divorced in late 2017 and had been separated for 12 months prior to the divorce. That is, their relationship ended no later than October 2016 and on the applicant's evidence, as early as August 2016, very short time after the applicant was granted the permanent visa.
28. The applicant states that the reason he moved out of the family home is because he had problems with his step-son and the sponsor's family and not because he had been granted the visa. In his statutory declaration submitted to the delegate the applicant outlined several issues that he claims had affected his relationship with the sponsor and he provided additional evidence to the Tribunal. In oral evidence the applicant told the Tribunal that his relationship with the sponsor ended because her son was a drug addict and her daughter was a suicide risk and he tried to help them as much as possible but it was not easy. The applicant states that his relationship with the sponsor did not break down and he did not move out because of his relationship with the sponsor. The applicant described the incidents within the family and how these affected him. The applicant states that the problems started in late 2014. The applicant claims he moved out in July 2016 but he 'kept the door open'.

The applicant states that the relationship did not break down at that time and the sponsor continued to come to his place and they continued to have an intimate relationship even in 2018. The applicant also told the Tribunal that the relationship broke down around October 2016 and the formal divorce took place in October 2017. When asked why he moved out of the family home almost immediately after being granted the permanent visa with the relationship ending shortly after, the applicant said that he was scared for his life and he did everything possible but it was not easy.

29. The Tribunal accepts that there may have been serious issues from the applicant's relationship with the sponsor's family and the Tribunal acknowledges declarations from third parties, as well as other independent evidence. However, it is not apparent to the Tribunal why these problems did not preclude the applicant's residence in the family home while the applicant was waiting for his permanent visa, despite what he refers to as significant problems with the children. The applicant's evidence to the Tribunal is that the problems started in 2014 and despite these, the applicant remained in the family home until August 2016, yet almost immediately after being granted the permanent visa, the applicant claims that he felt fearful for his safety and was unable to continue to live with the sponsor and her son. The applicant claims that his relationship with the sponsor was good even after he moved out of the family home but the fact that they divorced in late 2017 indicates that the relationship broke down irretrievably for at least 12 months prior to that, in late 2016 and the Tribunal does not accept the applicant's evidence that he and the sponsor maintained a relationship since that time.
30. As noted above, the Tribunal is concerned with the timing of the separation so soon after the permanent visa was granted, even though the applicant claims the problems existed for some time prior. The Tribunal does not accept that the applicant left the family home because of the problems with his step-son. Rather, it appears that he did so because he was granted the permanent visa and did not see a further need to remain with the sponsor.
31. The applicant submits that the sponsor had not withdrawn the sponsorship and declared herself that the relationship was genuine. It is not clear from the evidence whether she was aware of the existence of Ms Daisy Iyangbe during her relationship with the applicant (he claims he told her about the child before travelling to Nigeria in July 2016) and, if so, whether that would have affected her belief about the nature of her relationship with the applicant. Even if it was accepted that the sponsor believed the relationship to be a genuine one, the Tribunal's concern is whether it was mutually committed and to the exclusion of all others. The applicant submits that a single act of infidelity with Daisy does not mean the relationship with the sponsor was not genuine or exclusive. The Tribunal accepts that this is so. However, the Tribunal is not satisfied that in this case, the relationship between the applicant and Ms Daisy Iyangbe can be described as a single act of infidelity as there is a variety of evidence – albeit circumstantial – which may indicate that the applicant was in a relationship with Ms Daisy Iyangbe before being granted the visa.
32. The applicant's telephone records show that he contacted Ms Iyangbe's phone number after his return to Australia. The applicant claims it was a means to contact his sister, who was a friend of Daisy Iyangbe and could not use her own phone. The Tribunal accepts that it is a possibility, and it is equally possible that the applicant did contact Daisy Iyangbe following his return to Australia in 2014. The primary decision record indicates that Ms Iyangbe adopted the applicant's surname in 2014 and appears to have represented herself as being in a relationship with the applicant on Facebook. With respect to Ms Iyangbe's reference to the applicant on Facebook, the applicant claims that either it was not her genuine account but a fake account, or that she had deliberately lied on Facebook so as to secure his support for a visa. The applicant also claims that he did not authorise the use of his name by Ms Iyangbe prior to the marriage.

33. With respect to Ms Iyangbe's Facebook page, the applicant presented a statement from Ms Daisy Iyangbe stating that the Facebook account was fake and was not created by her and there is evidence that the 'fake' account was reported to Facebook. She states that some of the information on the Facebook page was clearly incorrect such as her education and employment. The Tribunal does not consider that incorrect details about one's employment or educational background is a sufficient basis for a finding that the account was a fake one and not created by Ms Daisy Iyangbe and the applicant's own evidence to the Tribunal is that she may have created that account herself so as to force him to sponsor her. The Tribunal is mindful that it contained personal photographs and it is more likely, in the Tribunal's view, that these would have been provided by Ms Daisy Iyangbe herself or obtained by someone in her surrounding who may well be aware of her personal circumstances, including marital status.
34. The applicant claims it is implausible that he would maintain a relationship with Ms Daisy Iyangbe if they had only met in 2014 at a function when he had spent merely two weeks in Nigeria and then maintained a relationship with the sponsor for a further two years. It is not clear to the Tribunal why the existence of a relationship in such circumstances is implausible. In the Tribunal's view, it is neither implausible nor very rare. It is entirely plausible, and possible, that the applicant and Ms Daisy Iyangbe did commence a relationship when the applicant visited Nigeria for two weeks in 2014, at that time they believed their child was conceived, and that they maintained some form of a relationship following the applicant's return to Australia. In reaching this conclusion, the Tribunal acknowledges the statement from the applicant's brother that there was no relationship between them before 2017. The Tribunal gives that statement little weight, firstly because the brother may be unaware of the applicant's personal affairs, and secondly, because he may be providing a statement to assist his brother.
35. The applicant submits that the child did not have a birth certificate or a baptism card with his surname, which also shows that there was no relationship since 2014, however, the applicant notes that his first name appears on the child's baptism card. It is not clear to the Tribunal why the absence of the applicant's surname should evidence the absence of the relationship between the applicant and Ms Daisy Iyangbe, yet the presence of the applicant's first name on the baptism card cannot be considered as evidence of such a relationship. The Tribunal acknowledges the evidence that the child's surname was changed in July 2016 and that Ms Daisy Iyangbe's surname was officially changed only after the marriage. The applicant's evidence is that in 2016 he confirmed, or accepted, his paternity and took steps to formalise his relationship with the child. That would explain the change of the child's surname in 2016. The Tribunal also accepts that Ms Daisy Iyangbe formally changed her surname following the marriage. However, the evidence indicates that she used the applicant's surname since 2014, even if informally, and that may suggest that she believed herself to be in a relationship with the applicant before the formal registration of their marriage.
36. Information before the Tribunal indicates that when preparing the passport application in 2015, the applicant identified his son as next of kin and gave Daisy's contact details. The Tribunal accepts that he did not use that form but the applicant does not appear to deny that he did complete the form. This information was put to the applicant pursuant to s. 359A of the Act. In his declaration dated 5 October 2020 the applicant states that this information is not accurate. The applicant states that he initially did contemplate listing Paul as his next of kin based on the pressure from his parents to accept the child but that should not evidence his relationship with the child's mother. Eventually, he decided against it as he had doubts, later confirmed by DNA testing. The applicant states that the information was illegally accessed by his ex-wife. He did not recognise Paul until 2016 but that does not mean he was unaware of the child's birth. The applicant claims he had no other relationships and no relationship with the child's mother. The applicant states that he did not use the child as his

next of kin in his passport application and he provided to the Tribunal a copy of the application. The Tribunal acknowledges that the applicant did not ultimately identify the child as his next of kin. However, the fact that he did so in his draft passport application in 2015 indicates that he was aware of the child's existence, and contemplated his relationship with the child, earlier than he now claims and that brings into question the veracity of the applicant's evidence and his overall credibility.

37. The applicant told the Tribunal that Daisy had a boyfriend and was only using him to get an Australian visa and for that reason, she lied to his parents about the child and she lied to him and his family. The applicant's evidence is that Daisy has now migrated to another country and did not want to have anything to do with him when she realised he would not sponsor her for a visa. It may be that the applicant no longer has a relationship with Daisy Iyangbe. The fact that she is now in a different relationship and in a different country does not affect the possibility of existence of the applicant's relationship with her in 2016.
38. Another concern for the Tribunal is the applicant's sponsorship of Daisy Iyangbe. In his response to the NOICC dated 7 November 2018 the applicant refers to the sponsorship of Ms Iyangbe for a Partner visa. That indicates the applicant's intention to represent his relationship with Ms Daisy Iyangbe as a genuine spousal relationship. However, his evidence to the Tribunal is that such a relationship never existed and that while he wanted Paul to live in Australia, Daisy would only agree to it if she was also sponsored for a visa. The Tribunal finds the applicant's evidence problematic. If the applicant never had a genuine spousal relationship with Daisy and only wished to sponsor her in order to bring the child to Australia, as he now claims, then his proposed sponsorship of Daisy for a Partner visa would be based on a claim that was false or misleading. Alternatively, the applicant did have a genuine spousal relationship with Daisy and intended to sponsor her for a Spouse visa and his present claim that there was never a genuine relationship is not true. The Tribunal has formed the view that the applicant is not a person of credibility.
39. The Tribunal considers that there are a number of factors which support the finding that the applicant's relationship with Ms Daisy Iyangbe started before the applicant was granted his permanent visa. These are
 - The intimate relationship in 2014 and the applicant's subsequent acceptance of the possibility that the child was his biological child, prior to the DNA test.
 - The use of the applicant's surname by Ms Iyangbe in her social media since July 2014. The Tribunal is not satisfied that the account was fake or that Ms Iyangbe had no involvement with it, given photographs and other personal information. As to the applicant's claim that Ms Iyangbe had intentionally created the account to falsify the relationship, in the Tribunal's view, it is equally plausible that she did so truthfully because the relationship did exist.
 - The applicant moving out of the family home and ceasing to share the household with the sponsor a very short time after being granted the permanent visa, coupled with the applicant's claim that he commenced relationship with Ms Iyangbe shortly being granted the permanent visa
 - The applicant's admitted contact with Ms Iyangbe in 2014 when the child was conceived and from 2016 once he was granted the permanent visa
 - The applicant's use of Ms Daisy Iyangbe's contact details in his draft passport application in Nigeria in March 2015 and the applicant's identification of Paul as his next of kin in the same draft application. Even though that draft form was not ultimately used, the applicant's identification of Paul and Daisy Iyangbe's contact

details cannot be overlooked. The Tribunal accepts that the recognition of the child does not necessarily imply the applicant's relationship with the child's mother, however, it is relevant, in the Tribunal's view, to the assessment of the applicant's credibility and the veracity of his claims.

40. None of these factors on their own may be indicative of the applicant's relationship with Daisy Iyangbe but in the Tribunal's view, the combination of these factors offers a strong indication that the applicant was in a relationship with Ms Iyangbe since 2014. That is, the applicant's relationship with the sponsor was not to the exclusion of all others from that time and before the applicant was granted the permanent visa.
41. The Tribunal finds that from 2014, the applicant's relationship with the sponsor was not to the exclusion of all others. The Tribunal finds that the applicant gave an incorrect answer in his 2015 application when he claimed that his relationship with the sponsor was still ongoing and to the exclusion of all others. The Tribunal finds that the applicant did not comply with s. 101 of the Act. The Tribunal finds that there was non-compliance with s. 101 by the applicant in the way described in the s.107 notice.

Should the visa be cancelled?

42. As the Tribunal has decided that there was non-compliance in the way described in the notice given to the applicant under s.107 of the Act, it is necessary to consider whether the visa should be cancelled pursuant to s.109(1). Cancellation in this context is discretionary, as there are no mandatory cancellation circumstances prescribed under s.109(2).
43. In exercising this power, the Tribunal must consider the applicant's response (if any) to the s.107 notice about the non-compliance, and have regard to any prescribed circumstances: s.109(1)(b) and (c). The prescribed circumstances are set out in r.2.41 of the Regulations. Briefly, they are:

The correct information

44. For the reasons stated above, the Tribunal has formed the view that the applicant formed a relationship with Ms Daisy Iyangbe from 2014. It follows that the correct information is that the applicant was not in an exclusive relationship with the sponsor before he was granted the permanent Partner visa.

The content of the genuine document (if any)

45. This is not relevant in the present case.

Whether the decision to grant a visa or immigration clear the visa holder was based, wholly or partly, on incorrect information or a bogus document

46. To be granted a Partner visa, the applicant was required to establish that he had a genuine spouse relationship with the sponsor and that his relationship was to the exclusion of all others. If it was known that the applicant may have had a relationship with another person, or if he declared he believed he had a child with another person, this would have been highly relevant to the assessment of the applicant's relationship with the sponsor.
47. The applicant submits in his written response to the NOICC that the sponsor was willing to accept the child and would have confirmed that her relationship with the applicant was genuine and continuing. The Tribunal is mindful that it must also be to the exclusion of all others. The Tribunal has formed the view that the applicant had been in a relationship with

another person from 2014 so that his relationship with the sponsor was not to the exclusion of all others, even if the sponsor considered herself to be in a genuine relationship.

48. Ultimately it is not necessary for the Tribunal to determine whether or not the visa would have been granted, had the correct information been known. The Tribunal finds that the decision to grant the visa was based, partly, on incorrect information. The Tribunal further finds that the possibility of another relationship would have been quite central to the assessment of the applicant's relationship with the sponsor and ultimately to the decision to grant him the visa.

The circumstances in which the non-compliance occurred

49. The applicant denies that his relationship with Ms Iyangbe started before he was granted the visa, claiming they never had a relationship and that the marriage and the sponsorship for the Tourist visa was only to enable him to bring the child to Australia and to 'save the child's life'. The applicant also repeatedly told the Tribunal that he never had a relationship with Ms Daisy Iyangbe and only sponsored her in order to bring the child to Australia. The Tribunal is mindful that if that was true, then the applicant's evidence in the Tourist visa application that he was sponsoring his partner and in response to the NOICC that he intended to sponsor Ms Daisy Iyangbe for a Spouse visa (on both occasions implying there was a spousal relationship) would amount to the provision of false or misleading information to the Department.
50. However, for the reasons stated elsewhere, the Tribunal has formed the view that the applicant did have a relationship with Ms Iyangbe and that the applicant's relationship with Ms Iyangbe started before he was granted the permanent visa. The Tribunal has formed the view that the applicant deliberately withheld that information so as not to jeopardise his Partner visa application.
51. The applicant told the Tribunal that it was not practicable to inform Immigration earlier about the existence of a child. The applicant states that he was not informed about the obligation to inform of changes in his circumstances and the applicant also states that he was living in a house with a drug addict and a suicidal person and the circumstances had been difficult. The applicant states that he did not intentionally fail to inform and he did inform Immigration in 2017 when he had some documents to prove his relationship with the child. The Tribunal does not accept the applicant's argument because he was advised of an obligation to inform by completing the application form and the Tribunal is not satisfied that the applicant's living arrangements precluded him from being able to inform the Department about the changes in his circumstances. However, as the DNA test has shown that the child is not the applicant's biological child, the Tribunal does not consider there has been a breach of s. 104 and draws no adverse conclusion from the failure to inform about the purported changes in the applicant's circumstances.

The present circumstances of the visa holder

52. The applicant states that he has been living in Australia for some years and has been employed, initially as a production operator and also as a ride share driver and a sports trainer and later as a guard. The applicant told the Tribunal about his current employment in the disability sector and the support he provides to the community. The Tribunal accepts that evidence.
53. The applicant claims that his relationship with Daisy Iyangbe has ended and he provided to the Tribunal a copy of the divorce order. In his written submission to the delegate the applicant referred to having another relationship with an Australian citizen, which

commenced in mid-2018 but he told the Tribunal that they are good friends but they are not in a relationship.

The subsequent behaviour of the visa holder concerning his or her obligations under Subdivision C of Division 3 of Part 2 of the Act

54. Nothing adverse is known about the applicant's subsequent behaviour

Any other instances of non-compliance by the visa holder known to the Minister

55. There are no other known instances of non-compliance.

The time that has elapsed since the non-compliance

56. The applicant provided answers on the form when the application was made in May 2013. The visa was granted. More than seven and a half years passed since the non-compliance.

Any breaches of the law since the non-compliance and the seriousness of those breaches

57. There are no known breaches of the law.

Any contribution made by the holder to the community.

58. In his evidence to the delegate the applicant refers to his employment, in particular as a sports trainer working with children and states that he contributes to the development of sport in Australia, as well as the development psycho-social skills in children. To the extent that the work as a trainer contributes to the development of sport and the development of children, the Tribunal accepts that evidence. The applicant told the Tribunal that he works in a disability sector and helps people and he gave examples of how he has helped people with disability. The applicant states that he is well regarded by his employer and his customers. The Tribunal accepts that evidence. The Tribunal also accepts that the applicant has been employed and paying taxes. The Tribunal accepts that the applicant had made a contribution to the community.

59. While these factors must be considered, they do not represent an exhaustive statement of the circumstances that might properly be considered to be relevant in any given case: *MIAC v Khadgi* (2010) 190 FCR 248. The Tribunal may also have regard to lawful government policy. The relevant policy is set out in the Department's Procedural Advice Manual) PAM3 'General visa cancellation powers', which refers to matters such as the consequences of cancelling the visa, international obligations and any other relevant matters.

Whether there are mandatory legal consequences

60. If the applicant's visa is cancelled, unless he is granted other visas, the applicant would be an unlawful non-citizen and may be detained. There is no suggestion that he will be detained indefinitely. The Tribunal acknowledges that unless the applicant is granted another visa, he may be an unlawful non-citizen and subject to detention and possible removal from Australia. There may be restrictions on the applicant's future travel and future visa applications as a consequence of the cancellation. There are no provisions in the Act which prevent the applicant from making a valid visa application without the Minister's intervention, although there will be limited opportunities for him to do so in Australia as a result of the cancellation. The applicant may be subject to an exclusion period in relation to future visa applications. The applicant may also lose some entitlements he may have acquired as an Australian permanent resident.

61. The applicant would also be unable to act as a sponsor for his partner and child, if he is not a holder of a permanent Australia visa. While the applicant suggested in his response to the NOICC that he may wish to sponsor Ms Iyangbe and the child to Australia, his evidence to the Tribunal is that the relationship has ended, the applicant provided evidence of divorce and told the Tribunal that they moved to Canada and that he has not contacted them since the DNA test results.

Whether there would be consequential cancellations under s.140

62. There are no persons who would be affected by the consequential cancellation.

Whether any international obligations would be breached as a result of the cancellation, such as non-refoulement obligations, family unity principles or the obligation to consider the best interests of the child.

63. In his evidence to the delegate the applicant refers to the two children of Ms Shultz. The applicant told the Tribunal that he is not in a relationship with Ms Shultz but he still maintains a relationship with the children and they love him like a father. The Tribunal notes that the applicant presented no evidence of having an ongoing relationship with the children, such as photographic evidence of any social activities, statements from those who observed their interactions or from the children's schools, a statement from Ms Shultz etc. The Tribunal is prepared to accept that the applicant may have maintained some form of contact with the children, given his past relationship with their mother (he refers to celebrating the children's birthdays, dropping them off to school, joint travel etc) but in the Tribunal's view, that is not sufficient to establish that there is a meaningful relationship between the applicant and these children. As noted above, there is very limited evidence of that relationship other than the applicant's own claims.
64. Overall, the Tribunal accepts that there may be some interactions between the applicant and Ms Shultz's children but on the very limited evidence before it, the Tribunal does not accept there is a meaningful relationship between them. The Tribunal does not consider that the best interests of these children require the applicant's presence in Australia or that their interests would be affected if the visa is cancelled. The Tribunal finds that the best interests of the children do not require the applicant's presence in Australia.
65. The applicant refers to the situation in Nigeria, stating that there would be a risk to his safety. The applicant states that as someone who lived overseas, he would be perceived as being wealthy and targeted by criminals. The applicant states that he would have to relocate to another part of Nigeria to avoid harm. The applicant refers to the activities of Boko Haram in the area where he lived and states that his life may be in danger. The applicant had presented very little detail and no probative evidence to support his claims. The Tribunal considers such generalised statements unhelpful. The Tribunal is not required to accept the applicant's assertions unquestioningly.
66. On the limited evidence before it, the Tribunal does not accept there is a real chance or a real risk of serious or significant harm or other adverse consequences if the applicant was returned to his home country. The Tribunal does not consider that Australia's non-refoulement obligations are engaged.
67. The Tribunal finds that Australia's international obligations would not be breached if the visa is cancelled.

Any other relevant matters, including the degree of hardship that may be caused to the visa holder and any family members.

68. The applicant refers in his submission to the delegate to the child's medical condition and he provided the medical reports. The Tribunal accepts that evidence but notes the applicant's evidence that he has not had any contact with the child since the DNA test results. In such circumstances, the Tribunal does not consider that any hardship would be caused to the applicant or the child resulting from the applicant's inability to sponsor the child in the future.
69. The applicant states in his evidence to the delegate that he has a substantial debt to the bank and travel agency and he is a provider for his parents. The applicant states that if his visa is cancelled, it would cause financial hardship and affect his financial responsibilities to his family and others. The applicant has not presented evidence of the debt at the time of this decision and no adequate evidence as to whether he would be able to meet his financial obligations if he is not the holder of an Australian permanent visa (including the circumstances in which the applicant may be required to depart Australia) but the Tribunal is prepared to accept that financial hardship would be caused to the applicant and his family if the visa is cancelled.
70. The applicant refers in his written submission to the delegate to an armed break-in at Ms Iyangbe's home and states that it is difficult for him to visit Nigeria where he has not lived for eight years. The applicant states that he would not have the funds to support his family and pay for his child's expenses (which no longer appears to be an issue). As noted above, the applicant has not presented adequate evidence to support these claims but the Tribunal accepts that considerable degree of hardship may be caused to the applicant and his family if the visa is cancelled, including financial hardship.
71. The applicant told the Tribunal that he would be unable to find a job in his home country and support himself and his pay in Nigeria would be minimal and his standard of life would be reduced. The Tribunal is of the view that, having been able to establish himself in a foreign country, having qualifications, experience and other skills, it would not be unreasonable for the applicant to relocate to another part of the country to avoid any risk of harm. The applicant told the Tribunal that he would not be able to get a job. The Tribunal is mindful that the applicant did have a job before leaving the country. The applicant explained that previously he had just completed university and his military service but now he has been out of the country for several years and has no connections so he may not be able to get a job. The applicant does not claim he has made job applications and been denied employment. The applicant presented no evidence concerning the job market, or requirements for obtaining a job. The applicant is making nothing more than broad statements which the Tribunal is not prepared to accept without probative evidence. The Tribunal is not satisfied on the evidence before it that the applicant will be unable to find a job in Nigeria. It may be that the applicant's income may be reduced and it may affect his standard of living.
72. The applicant told the Tribunal that he may be diagnosed with anaemia and he is under investigation. The applicant states that he may not have access to healthcare in Nigeria, particularly if he is unable to find a job. The Tribunal has rejected the applicant's claim that he would be unable to get a job in his home country. The applicant also failed to establish that he would be denied access to health care. This is particularly so as the applicant does not claim to be under treatment at present. It is difficult to see how the applicant could be said to be denied adequate healthcare when the applicant has not presented evidence that he has any healthcare needs at present or what such needs may be in the future.
73. In his response to the NOICC the applicant states that he has a better earning capacity in Australia which has enabled him to pay for a good school for his son. The applicant also states he is concerned about his son's health issues. The applicant states that if his visa is

cancelled, he may be unable to fund expensive surgery or treatment for the child and it would not be possible for him to pay for the child's schooling. In his subsequent submissions to the delegate the applicant questions the paternity of Paul and states that his relationship with Daisy Iyangbe has ended. In his submission to the delegate of 25 January 2019 the applicant refers to his loss of contact with the child and with Ms Daisy Iyangbe and the applicant's evidence to the Tribunal is that he is not the biological father of Paul and has not had any contact with Paul or Daisy Iyangbe since the DNA test results. In such circumstances, the Tribunal finds that the applicant does not have a relationship with Paul and has no parental responsibilities in relation to that child. The Tribunal does not consider that the applicant's claimed inability to provide financial support to the child, in circumstances where the applicant no longer has contact with the child and does not consider the child to be his, would result in hardship.

74. The applicant states that he loves Australia and it is his only home. He has been living away from Nigeria for many years and would have to 'start again'. The Tribunal acknowledges that the applicant has been living in Australia for a number of years and appears to be settled in this country. The Tribunal accepts that evidence.
75. The Tribunal has considered the totality of the evidence before it. The Tribunal has formed the view that the applicant did not comply with s. 101 of the Act because he gave incorrect answers on the application form.
76. The Tribunal considers that there are strong reasons why the visa should not be cancelled. In particular, the Tribunal acknowledges that a long time has passed since the non-compliance and that the applicant has settled in Australia and has contributed to the Australian community. The Tribunal accepts that he has formed relationships in Australia, is considered by others to be of good character and is well regarded by his employer and clients. The Tribunal accepts that considerable hardship may be caused to the applicant and his family if his visa is cancelled, including financial and other hardship as the Tribunal accepts that the applicant provides support to his family and also that he has been away from his home country and would have to re-establish himself. The Tribunal acknowledges that there are no other breaches of the law and no other apparent instances of non-compliance.
77. Against these considerations, the Tribunal has considered the circumstances in which the non-compliance occurred. The Tribunal has formed the view that the applicant commenced another relationship while he was seeking a Partner visa on the basis of his relationship with an Australian partner. The nature of that relationship was central to the applicant's eligibility for the visa. (While the applicant now claims he may have been subjected to family violence by the sponsor's son, there is nothing to suggest the applicant was granted the Partner visa on the basis of the family violence claims.) The Tribunal places greater weight on the fact that the decision to grant the Partner visa was based on incorrect information. The Tribunal has formed the view that the applicant had deliberately withheld information about his interactions with Daisy Iyangbe and Paul before he was granted the permanent visa so as not to jeopardise the visa grant. The Tribunal has found that Australia's international obligations would not be breached as a result of the cancellation.
78. The Tribunal has decided that there was non-compliance by the applicant in the way described in the notice given under s.107 of the Act. Further, having regard to all the relevant circumstances, as discussed above, the Tribunal concludes that the visa should be cancelled.

DECISION

79. The Tribunal affirms the decision to cancel the applicant's Subclass 801 (Spouse) visa.

Kira Raif
Senior Member